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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ELAINE CUNNINGHAM-DIRKS, et al.,)

Plaintiffs,)

v.)

STATE OF NEVADA, et al.,)

Defendants.)

2:12-CV-00590-PMP-VCF

ORDER

Presently before the Court is Defendant Summerlin Hospital Medical Center, LLC’s (“Summerlin”) Motion to Dismiss Plaintiffs’ Amended Complaint (Doc. #8), filed on August 2, 2012.¹ Also before the Court is Defendant State of Nevada’s Motion to Dismiss (Doc. #14), filed on August 6, 2012. Defendant American Medical Response, Inc. (“American Medical”) filed Joinders (Doc. ##12, 17) to Summerlin and State of Nevada’s Motions to Dismiss on August 3, 2012, and August 7, 2012. Plaintiffs filed a consolidated Opposition to both Motions to Dismiss (Doc. #19) on August 17, 2012, to which they attached a proposed Second Amended Complaint. State of Nevada filed a Reply (Doc. #20) on August 24, 2012. Summerlin filed a Reply (Doc. #21) on August 27, 2012. On August 29, 2012, American Medical filed Joinders (Doc. ##22, 24) to the State of Nevada and Summerlin’s Replies. On September 4, 2012, Plaintiffs filed a Surreply (Doc. #29).

¹ Defendant Summerlin Hospital Medical Center, LLC contends it incorrectly was named Valley Health Systems in Plaintiffs’ Amended Complaint. (Def. Summerlin Hosp. Med. Ctr., LLC’s Mot. to Dismiss (Doc. #8) at 1.) Plaintiffs respond that they “are bringing this action against Valley Health Systems, by and through it’s entities, Centennial Hills Hospital, Valley Hospital and Summerlin Hospital . . . [t]herefore, the correct entity was served.” (Mot. to Set Hearing in Opp’n of Dismissal (Doc. #19) at 5.) For the purposes of this Order, the Court will refer to this defendant as “Summerlin.”

1 Also before the Court is Plaintiffs' Motion for Leave to Amend the Complaint
2 (Doc. #27), filed on September 4, 2012. Summerlin filed an Opposition (Doc. #30) on
3 September 12, 2012. State of Nevada filed a Joinder to Summerlin's Opposition (Doc. #33)
4 on September 18, 2012. Plaintiffs filed a Reply (Doc. #36) on September 24, 2012.

5 Also before the Court is Plaintiffs' Motion to Challenge the Constitutionality of
6 Nevada Revised Statutes (Doc. #42), filed on October 22, 2012. Summerlin filed an
7 Opposition (Doc. #48) on October 29, 2012. State of Nevada filed an Opposition (Doc.
8 #50) on October 31, 2012. American Medical filed Joinders (Doc. ##49, 51) to the
9 Oppositions on October 29, 2012, and October 31, 2012. Plaintiffs filed Replies (Doc.
10 ##54, 55) on November 8, 2012.

11 The Court held a hearing on these Motions on December 10, 2012. (Mins. of
12 Proceedings (Doc. #57).) At the hearing, Plaintiffs presented a prepared statement which
13 was filed on December 10, 2012. (Mem. of Law in Support of Pls.' Mots. (Doc. #58).)

14 **I. BACKGROUND**

15 This lawsuit arises out of the involuntary commitment of Plaintiff Dewey Dirks
16 ("Dirks"), a mentally ill individual, to a medical facility. Dirks and his wife, Elaine
17 Cunningham-Dirks ("Cunningham-Dirks"), allege criminal violations, Health Insurance
18 Portability and Accountability Act ("HIPAA") violations, constitutional and civil rights
19 violations, state law claims for violation of over eighty Nevada statutes related to mental
20 health and medical facilities as well as claims for false imprisonment, negligent infliction of
21 emotional and physical distress, libel, slander, fraud, and negligence. Plaintiffs allege
22 claims against Summerlin, the State of Nevada, and American Medical. In the Amended
23 Complaint, Plaintiffs also reference Rawson-Neal Psychiatric Hospital ("Rawson-Neal"),
24 Centennial Hills Hospital, and Valley Hospital, but these Defendants are not listed in the
25 caption and have not been served.

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1 It is unclear whether this lawsuit involves one hospital stay or multiple stays.
2 Plaintiffs allege Defendants’ conduct took place “[a]t multiple times between April 12,
3 2010 and April 17, 2012.” (Am. Compl. (Doc. #4) at 2.) Elsewhere in the Amended
4 Complaint, Plaintiffs allege Defendants’ conduct “result[ed] in the events of April 6, 2012.”
5 (Id. at ¶ 34.) It is also unclear which medical facility or facilities to which Dirks was
6 transported and involuntarily committed, in part because the Amended Complaint refers to
7 Defendants as a group and does not specify which Defendant’s conduct underlies each of
8 the claims. Finally, it is unclear exactly when Dirks was involuntarily committed to each of
9 the facilities.

10 Plaintiffs allege that in response to a 311 call for “mental illness issues,” Dirks
11 was transported in an ambulance by two female paramedics, without Cunningham-Dirks in
12 attendance, to a medical facility. (Am. Compl., ¶ 10.) Plaintiffs further allege Dirks was
13 held against his will because Defendants wrongfully filed an application for emergency
14 admission of Dirks to a medical facility under Nevada Revised Statutes § 433A.160,
15 commonly known as a “Legal 2000” commitment. (Id. at ¶ 7.) Plaintiffs allege the
16 application was wrongful because Dirks could not understand the implications of the
17 application or other legal matters, because Defendants should have notified Cunningham-
18 Dirks of the application on her husband’s behalf, and because Dirks was not a danger to
19 himself or others. (Id. at ¶¶ 8-9, 33.) Further, Plaintiffs allege Defendants ignored
20 Plaintiffs’ statements that they were “voluntarily seeking help.” (Id. at ¶ 19.)

21 Plaintiffs allege Defendants “allowed, intimidated, and coerced” Dirks into
22 answering questions, signing legal documents, and accepting treatment without proper
23 disclosures even though Dirks was “a person clearly not of sound mind.” (Id. at ¶¶ 11-12.)
24 Plaintiffs allege Defendants denied Cunningham-Dirks access to her husband, violated her
25 right to advocate for her husband, violated her rights specified in a power of attorney, failed
26 to inform her of her husband’s condition and treatment options, and inhibited her attempts

1 to obtain proper treatment for her husband. (Id. at ¶¶ 13, 14, 16, 25, 28.) Plaintiffs also
2 allege Defendants failed to give them copies of documents as required under Nevada law
3 and falsified documents “to facilitate hospital/ambulance company policy and staff
4 convenience.” (Id. at ¶¶ 15, 17.)

5 Moreover, Plaintiffs allege Defendants made false claims regarding Dirks’s
6 medication compliance and committed libel and slander by accusing Dirks of inappropriate
7 and criminal behavior and by claiming Dirks was dangerous. (Id. at ¶¶ 20-22, 24.)
8 Cunningham-Dirks also alleges she was slandered because Defendants stated she was
9 unable to appropriately care for her husband. (Id. at ¶ 23.) Further, Plaintiffs allege
10 Defendants violated HIPAA by knowingly making false statements to Plaintiffs and by
11 withholding vital information from Plaintiffs. (Id. at ¶¶ 26-27.)

12 Finally, Plaintiffs allege Defendants violated Dirks’s constitutional right to be
13 free from cruel and unusual punishment by “keeping an already frightened and paranoid
14 man secluded from familiar people and surroundings the vast majority of the day
15 jeopardizing any sense of security [Dirks] may have.” (Id. at ¶ 29.) Plaintiffs further allege
16 that Defendants violated Dirks’s “due process right to adequate food, clothing, shelter,
17 medical care and adequate mental health treatment,” and that they violated his constitutional
18 right to liberty by involuntarily committing him despite Cunningham-Dirks’s willingness to
19 care for him and the fact he was not dangerous to himself or others. (Id. at ¶¶ 30, 33.)
20 Plaintiffs also allege Defendants exposed Dirks to “inappropriately lengthy periods of
21 mechanical restraints.” (Id. at ¶ 32.) Finally, Plaintiffs allege Defendants eavesdropped
22 and possibly recorded Plaintiffs’ personal conversations in violation of their constitutional
23 right to privacy. (Id. at ¶ 18.)

24 Plaintiffs brought suit in this Court on April 11, 2012. (Compl. (Doc. #1).)
25 Before the Complaint was served, Plaintiffs filed an Amended Complaint including
26 additional factual allegations on July 10, 2012. (Am. Compl. (Doc. #4).) Defendants

1 Summerlin, State of Nevada, and American Medical now move to dismiss all claims alleged
2 against them in the Amended Complaint.

3 **II. SUMMERLIN HOSPITAL’S MOTION TO DISMISS (Doc. #8)**

4 Summerlin moves to dismiss, arguing the Court lacks subject matter jurisdiction
5 because there is not a proper federal question presented. Summerlin also argues that
6 because Plaintiffs’ federal claims fail, the Court should decline to exercise supplemental
7 jurisdiction over the remaining state law claims. If the Court exercises jurisdiction over the
8 state law claims, Summerlin argues they fail as a matter of law. Summerlin further argues
9 that Plaintiffs’ claims all center on allegedly improper medical care and that the Court
10 should dismiss the Amended Complaint because Plaintiffs fail to attach a medical expert’s
11 supporting affidavit as required by Nevada Revised Statutes § 41A.071. American Medical
12 joins in Summerlin’s Motion in its entirety.

13 Plaintiffs respond that Summerlin’s rendition of the facts is inaccurate, and
14 Plaintiffs attach a proposed Amended Complaint as well as a “correct statement of fact” to
15 their Response. (Pls.’ Mot. to Set Hearing in Opp’n of Dismissal (Doc. #19) [Pls.’ Opp’n”],
16 Attach. 1, Ex. 4.) Plaintiffs clarify that Dirks was not brought to the emergency room at
17 Summerlin on a Legal 2000 admission by the police, but that Cunningham-Dirks asked a
18 friend to call an ambulance to take Dirks to the emergency room to obtain a sedative, and
19 that hospital staff subsequently filed a Legal 2000 application. (Pls.’ Opp’n, ¶ 2, Ex. 4;
20 Pls.’ Reply to Summerlin Hosp. (Doc. #29) at 4.) Plaintiffs do not directly respond to
21 Summerlin’s argument that the Court lacks subject matter jurisdiction. However, Plaintiffs
22 argue the Court has jurisdiction to prevent future civil rights violations with respect to
23 Nevada’s mentally ill population by implementing a proposed ombudsman program, a copy
24 of which Plaintiffs attached to their Response. (Pls.’ Opp’n, Ex. 2.)

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1 **A. 18 U.S.C. §§ 241 and 242 Claims**

2 Summerlin argues that Plaintiffs’ claims under 18 U.S.C. §§ 241 and 242 must
3 fail because they are criminal statutes that do not provide a private right of action.
4 Summerlin further argues that because no private right of action exists, these statutes cannot
5 provide a basis for Plaintiffs’ 42 U.S.C. § 1983 claim. Plaintiffs do not respond to these
6 arguments.

7 Title 42 U.S.C. § 1983 provides that “[e]very person who, under color of [law],
8 subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of
9 any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to
10 the party injured in an action at law” Section 1983 does not create any substantive
11 rights, but provides a method for enforcing rights contained in the Constitution or federal
12 statutes. Crowley v. Nev. ex. rel. Nev. Sec’y of State, 678 F.3d 730, 734 (9th Cir. 2012).
13 To provide a basis for private enforcement under § 1983, a statute must “unambiguously
14 confer[]” an individually enforceable right. Gonzaga Univ. v. Doe, 536 U.S. 273, 283
15 (2002). “[W]here the text and structure of a statute provide no indication that Congress
16 intends to create new individual rights, there is no basis for a private suit, whether under
17 § 1983 or under an implied right of action.” Id. at 286.

18 Title 18 U.S.C. § 241 provides for the criminal prosecution of two or more
19 persons conspiring to interfere with the constitutional or legal rights of another individual.
20 Section 242 provides for criminal prosecution of a person who, acting under the color of
21 state law, deprives another of his or her rights secured by the Constitution or federal
22 statutes. Although these statutes provide penalties ranging from fines to imprisonment, they
23 do not provide individuals with a private right of action. Aldabe v. Aldabe, 616 F.2d 1089,
24 1092 (9th Cir. 1980) (holding that §§ 241 and 242 “provide no basis for civil liability”).

25 It is unclear whether Plaintiffs intend for § 1983 liability to be predicated on the
26 violations of these criminal statutes or whether Plaintiffs intend for violation of §§ 241 and

1 242 to be stand alone claims. Given that §§ 241 and 242 do not create individually
2 enforceable rights to prosecute violations of these statutes in civil cases, violations of
3 §§ 241 and 242 do not provide a cause of action under § 1983. Further, there is no private
4 right of action under §§ 241 and 242, and thus Plaintiffs’ stand alone claims under these
5 statutes, if any, fail as a matter of law. The Court therefore will dismiss Plaintiffs’ §§ 241
6 and 242 claims with prejudice.

7 **B. HIPAA Claims**

8 Summerlin argues HIPAA does not provide a private right of action, thereby
9 requiring dismissal of this claim. Summerlin further argues that because no private right of
10 action exists, HIPAA cannot provide a basis for Plaintiffs’ § 1983 claim. Plaintiffs respond
11 that although HIPAA does not provide a private right of action, “the misinterpretation of
12 HIPAA . . . does.” (Pls.’ Opp’n, ¶ 5.)

13 HIPAA does not create an implied private right of action due to the availability of
14 monetary and criminal penalties to be assessed by the Secretary of Health and Human
15 Services or the State for HIPAA violations. See 42 U.S.C. §§ 1320d-5, d-6; see also Seaton
16 v. Mayberg, 610 F.3d 530, 533 (9th Cir. 2010) (no private right of action under HIPAA);
17 Univ. of Colo. Hosp. Auth. v. Denver Publ’g Co., 340 F. Supp. 2d 1142, 1143-46 (D. Colo.
18 2004) (holding that HIPAA’s statutory text and structure display no intent to create a
19 private right of action, and noting that HIPAA expressly provides enforcement mechanisms,
20 indicating Congress did not intend to allow an additional private remedy). However,
21 “whether a statutory violation may be enforced through § 1983 is a different inquiry than
22 that involved in determining whether a private right of action can be implied from a
23 particular statute.” Gonzaga, 536 U.S. at 283 (quotation omitted). Both inquiries have the
24 same first step, which requires “a determination as to whether or not Congress intended to
25 confer individual rights upon a class of beneficiaries.” Id. at 285. The inquiries differ at the
26 second step. For implied right of action cases, the underlying statute must create a remedy.

1 Id. at 284. For § 1983 cases, the text of § 1983 creates the remedy. Id.

2 In implied right of action cases, federal courts have held that HIPAA does not
3 create a private right. Acara v. Banks, 470 F.3d 569, 571-72 (5th Cir. 2006). Rather than
4 conferring privacy rights on a specific class of individuals, HIPAA “focuses on regulating
5 persons that have access to individually identifiable medical information and who conduct
6 certain electronic health care transactions.” Id. at 571. “Statutes that focus on the person
7 regulated rather than the individuals protected create no implication of an intent to confer
8 rights on a particular class of persons.” Gonzaga, 536 U.S. at 278 (quotation omitted).
9 Because HIPAA does not create a private right, it cannot be enforced via § 1983.

10 It is unclear whether Plaintiffs intend for § 1983 liability to be predicated on
11 HIPAA violations or whether Plaintiffs intend for the HIPAA violations to be stand alone
12 claims. Given that HIPAA does not create a private right, it cannot be enforced via § 1983.
13 Further, because there is not an implied private right of action for HIPAA violations,
14 Plaintiffs’ stand alone claims under HIPAA, if any, fail as a matter of law. The Court
15 therefore will dismiss Plaintiffs’ HIPAA claims with prejudice.

16 **C. Constitutional § 1983 Claims**

17 1. State Actor

18 In its Joinder to State of Nevada’s Motion to Dismiss, American Medical argues
19 it is not a state actor for § 1983 purposes. (Def. Am. Med. Response’s Joinder to Def. State
20 of Nev.’s Mot. to Dismiss (Doc. #17) at 3.) Summerlin also argues it is not a state actor,
21 but Summerlin raises this argument for the first time in its Reply. (Def. Summerlin Hosp.
22 Med. Ctr., LLC’s Reply in Support of Its Mot. to Dismiss (Doc. #21), at 3-4.) Although the
23 Court normally will not consider arguments raised for the first time on reply, the Court will
24 resolve this issue because it goes to the Court’s subject matter jurisdiction, which the Court
25 has an independent obligation to examine. United Investors Life Ins. Co. v. Waddell &
26 Reed, Inc., 360 F.3d 960, 966-67 (9th Cir. 2004).

1 The Nevada Supreme Court has held that “Nevada statutory provisions allowing
2 private persons to detain the mentally ill constitute a delegation of state power, and the
3 restraint of individuals against their will under a statutory grant of power constitutes state
4 action.” Cummings v. Charter Hosp. of Las Vegas, Inc., 896 P.2d 1137, 1144-45 (Nev.
5 1995). Consequently, the hospital Defendants, such as Summerlin, are state actors for
6 § 1983 purposes when exercising power under the emergency admission statute, Nevada
7 Revised Statutes § 433A.160.

8 As for American Medical, the Amended Complaint contains no factual
9 allegations that American Medical exercised any power under the emergency admission
10 statute that would make it a state actor. The Amended Complaint merely alleges American
11 Medical transported Dirks to the hospital. It is unclear from the Amended Complaint’s
12 allegations whether Dirks voluntarily took the ambulance ride and was involuntarily
13 committed only after his arrival at the hospital. (See Am. Compl., ¶ 10 (alleging that an
14 ambulance responded to a 311 call for mental illness).) The Court therefore will dismiss
15 Plaintiffs’ § 1983 constitutional claims as to American Medical only, with leave to amend
16 to add factual allegations regarding why American Medical would be a state actor.

17 2. Qualified Immunity

18 Summerlin moves to dismiss Plaintiffs’ constitutional claims under § 1983 based
19 on qualified immunity. In ruling on a qualified immunity defense, a court considers
20 whether the facts alleged show the defendant’s conduct violated a constitutional right.
21 Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002). If the plaintiff has shown a
22 deprivation of a constitutional right, the court must determine whether that right was clearly
23 established. Id. A right is clearly established if “‘it would be clear to a reasonable officer
24 that his conduct was unlawful in the situation he confronted.’” Wilkins v. City of Oakland,
25 350 F.3d 949, 954 (9th Cir. 2003) (emphasis omitted) (quoting Saucier v. Katz, 533 U.S.
26 194, 202 (2001)).

1 Summerlin argues it is entitled to qualified immunity because Nevada law
2 provides immunity to hospitals and ambulance personnel in involuntary commitment
3 situations unless the plaintiff alleges bad faith, malice, or negligence causing bodily harm,
4 citing Marshall v. Eighth Judicial District Court, 836 P.2d 47, 52 (Nev. 1992), in support.
5 However, state law cannot immunize conduct which violates the federal Constitution.
6 Wallis v. Spencer, 202 F.3d 1126, 1144 (9th Cir. 2000) (“Immunity under § 1983 is
7 governed by federal law; state law cannot provide immunity from suit for federal civil
8 rights violations.”). As this is Summerlin’s only qualified immunity argument, the Court
9 will deny Summerlin’s Motion to Dismiss on this basis.

10 3. Constitutional Claims

11 Besides its arguments regarding whether it is a state actor and qualified
12 immunity, Summerlin does not address the merits of Plaintiffs’ constitutional claims in its
13 Motion. Given that Plaintiffs’ federal statutory claims fail as a matter of law, Plaintiffs’
14 constitutional claims provide the only basis for federal subject matter jurisdiction. Because
15 the Court has an independent obligation to examine its own jurisdiction, the Court will
16 address each of Plaintiffs’ constitutional claims.

17 a. Fifth and Eighth Amendment Claims

18 Plaintiffs allege a Fifth Amendment violation related to Defendants’ questioning
19 of Dirks while he was mentally incapacitated, thus leading him to incriminate himself.
20 However, a Fifth Amendment violation does not occur “unless and until allegedly coerced
21 statements were used against the suspect in a criminal case.” Stoot v. City of Everett, 582
22 F.3d 910, 923 (9th Cir. 2009). There is no allegation Dirks was subject to any criminal
23 proceedings, and thus the Fifth Amendment does not apply. Plaintiffs also allege an Eighth
24 Amendment violation, however, there is no allegation in the Amended Complaint that Dirks
25 was convicted of a crime, and thus the Eighth Amendment does not apply. Hawkins v.
26 Compartet-Cassani, 251 F.3d 1230, 1238 (9th Cir. 2001). As such, the Court will dismiss

1 Plaintiffs’ Fifth Amendment and Eighth Amendment claims with leave to amend to add
2 factual allegations regarding criminal proceedings or convictions related to this case to
3 which Dirks was subjected, if such facts exist.

4 b. Fourth Amendment Claim

5 Plaintiffs allege a Fourth Amendment violation related to eavesdropping on
6 Plaintiffs’ personal conversations. To the extent eavesdropping could be considered a
7 Fourth Amendment search in this context, and assuming Summerlin was acting as a state
8 actor when it allegedly eavesdropped, there are no factual allegations about when or where
9 these personal conversations occurred, or any other facts which would support the
10 legitimate expectation of privacy necessary to allege a Fourth Amendment search claim.
11 See United States v. Nerber, 222 F.3d 597, 599 (9th Cir. 2000) (stating that to establish a
12 legitimate expectation of privacy to support a Fourth Amendment claim, a plaintiff must
13 show a subjective expectation of privacy, and that this expectation was “one that society is
14 prepared to recognize as reasonable” (quotation omitted)). Because the Amended
15 Complaint has no factual allegations supporting this claim, the Court will dismiss Plaintiffs’
16 Fourth Amendment claim with leave to amend to add factual allegations supporting a
17 plausible entitlement to relief.

18 c. Fourteenth Amendment Claims

19 Plaintiffs allege their Fourteenth Amendment due process rights were violated
20 because the application for emergency admission under § 433A.160 was filed without
21 notice to Plaintiffs and without an opportunity to respond. It is unclear whether Plaintiffs
22 are challenging Chapter 433A as a whole for failing to provide a mechanism to challenge
23 continued involuntary commitment within the 72-hour emergency hold period, or whether
24 Plaintiffs are alleging a failure to follow existing statutory requirements in their particular
25 circumstances. The Court therefore will dismiss this Fourteenth Amendment claim with
26 leave to amend to clarify exactly what Plaintiffs are alleging regarding lack of notice.

1 Plaintiffs also allege a Fourteenth Amendment due process violation based on a
2 deprivation of food, clothing, shelter, medical care, and adequate mental health treatment.
3 There are no factual allegations that Dirks was deprived of any of these things during his
4 various stays. However, Plaintiffs allege Dirks was subjected to unjustifiably long periods
5 of mechanical restraints. That potentially is a viable due process liberty claim. Youngberg
6 v. Romeo, 457 U.S. 307, 316 (1982) (holding that involuntarily committed individuals have
7 liberty interests in being free from bodily restraint). However, there are no factual
8 allegations as to which Defendant or Defendants placed Dirks in mechanical restraints or
9 for how long each Defendant did so sufficient to support a plausible entitlement to relief.
10 This Court therefore will dismiss this Fourteenth Amendment claim with leave to amend to
11 add factual support and to ascribe conduct to particular Defendants.

12 Finally, Plaintiffs allege a Fourteenth Amendment claim for deprivation of liberty
13 based on the factual allegation that Dirks was involuntarily committed even though he was
14 not a danger to himself or others. “[C]ivil commitment for any purpose constitutes a
15 significant deprivation of liberty that requires due process protection.” Addington v. Texas,
16 441 U.S. 418, 425 (1979). Under Nevada Revised Statutes § 433A.160(1)(a), an
17 emergency admission may be made without a warrant only if the authorized physician has
18 “probable cause to believe that the person has a mental illness and, because of that illness, is
19 likely to harm himself or herself or others if allowed his or her liberty.” Taking Plaintiffs’
20 allegations and all reasonable inferences therefrom as true that Dirks was not a danger to
21 himself or others, Plaintiffs have stated a due process claim that Summerlin deprived Dirks
22 of liberty by involuntarily committing him without probable cause to believe he was likely
23 to harm himself or others if released.

24 To summarize, the Court will dismiss Plaintiffs’ Fourteenth Amendment claims
25 based on allegations of (1) violations of § 433A.160 and/or Chapter 433A, (2) deprivation
26 of food, clothing, shelter, medical care, and adequate mental health treatment, and

1 (3) unjustifiably long periods of mechanical restraints, with leave to amend to add factual
2 allegations sufficient to support a plausible entitlement to relief. Plaintiffs' allegation that
3 Dirks was deprived of his liberty even though he was not a danger to himself or others
4 states a viable claim under the Fourteenth Amendment and therefore survives dismissal.

5 **D. State Law Claims**

6 Given that Plaintiffs stated a colorable claim for violation of Dirks's due process
7 rights under the Fourteenth Amendment, the Court will exercise supplemental jurisdiction
8 over Plaintiffs' state law claims. Plaintiffs allege state law claims for false imprisonment,
9 negligent infliction of emotional and physical distress, libel, slander, fraud, and negligence.
10 Plaintiffs also allege Defendants violated over eighty Nevada statutes related to mental
11 health and medical facilities including Nevada Revised Statutes §§ 449.710, 449.720,
12 449.730, 433.741 through 433.5503, and 433A.155 through 433A.580.

13 1. False Imprisonment

14 Summerlin argues Plaintiffs' false imprisonment claim should be dismissed
15 because Summerlin is immune from civil liability related to Dirks's involuntary
16 commitment under § 433A.740, which provides qualified immunity to ambulance and
17 hospital personnel who respond to calls involving mentally ill individuals and assist in
18 detaining those individuals. Summerlin further argues the immunity cannot be pierced
19 because Plaintiffs do not allege malice, bad faith, or negligence causing bodily harm related
20 to Dirks's involuntary commitment. Plaintiffs do not respond to Summerlin's arguments.

21 To state a claim for false imprisonment, a plaintiff must allege (1) the defendant
22 "intend[ed] to confine the other or a third person within boundaries fixed by the actor,"
23 (2) "his act directly or indirectly results in such a confinement of the other," and (3) the
24 plaintiff "is conscious of the confinement or is harmed by it." Hernandez v. City of Reno,
25 634 P.2d 668, 671 (Nev. 1981) (quotation omitted). However, in the context of involuntary
26 commitments under Chapter 433A, a defendant may be immune from civil liability for false

1 imprisonment and other claims if certain conditions are met. Pursuant to § 433A.740,

2 [a]ny public officer or employee who transports or delivers or assists in
3 transporting or delivering or detains or assists in detaining any person
4 pursuant to the provisions of this chapter shall not be rendered civilly or
5 criminally liable thereby unless it is shown that such officer or employee
acted maliciously or in bad faith or that his or her negligence resulted in
bodily harm to such person.

6 Here, Plaintiffs have stated a claim for false imprisonment: they allege that
7 Defendants intended to confine Dirks by filing the wrongful involuntary commitment
8 petition even though Dirks was not a danger to himself or others, that Defendants' acts
9 resulted in Dirks's confinement in the medical facility, and that Dirks was aware of the
10 involuntary commitment. However, under § 433A.740, Defendants are immune from civil
11 liability for this claim because Plaintiffs do not allege Defendants acted with malice, bad
12 faith, or that Dirks was physically harmed as a result of the involuntary commitment. The
13 Court therefore will dismiss Plaintiffs' false imprisonment claim with leave to amend to
14 allege facts indicating Defendants acted with malice or bad faith or that Dirks suffered
15 bodily harm as a result of Defendants' negligence, if such facts exist.

16 2. Negligent Infliction of Emotional Distress ("NIED")

17 Summerlin argues Plaintiffs' claim for NIED should be dismissed because Dirks
18 could not be a bystander to his own injuries and because Cunningham-Dirks does not allege
19 she witnessed any of the events related to Dirks's involuntary commitment. Rather,
20 Plaintiffs allege Dirks was transported in an ambulance to a medical facility "without
21 spouse in attendance." (Am. Compl., ¶ 10.) Plaintiffs do not respond to these arguments.

22 Given the scarcity of factual allegations in the Amended Complaint, it is unclear
23 whether Plaintiffs are attempting to allege a direct claim of NIED with respect to Dirks or a
24 bystander NIED claim with respect to Cunningham-Dirks. To establish a direct claim of
25 NIED, a plaintiff must show (1) the defendant acted negligently, (2) either a physical
26 impact or, in the absence of a physical impact, proof of serious emotional distress causing

1 physical injury or illness, and (3) actual or proximate causation. Barnettler v. Reno Air,
2 Inc., 956 P.2d 1382, 1387 (Nev. 1998). An NIED claim under a bystander theory requires a
3 bystander: (1) be closely related to the victim of an accident, (2) be located near the scene
4 of the accident, and (3) suffer a shock resulting from direct emotional impact stemming
5 from the sensory and contemporaneous observance of the accident. Crippens v. Save On
6 Drug Stores, 961 P.2d 761, 762 (Nev. 1998).

7 Here, Plaintiffs fail to plead the requisite elements of a direct NIED claim or a
8 bystander NIED claim. Because the Amended Complaint has no factual allegations
9 supporting these claims, the Court will dismiss this claim with leave to amend to add factual
10 allegations supporting a plausible entitlement to relief.

11 3. Libel and Slander

12 Summerlin argues Plaintiffs' defamation claims should be dismissed because
13 Plaintiffs provide only generalities about Defendants' statements. Summerlin contends that
14 without presenting the actual statements so they can be reviewed in context, it cannot
15 adequately defend itself. Summerlin also argues Plaintiffs do not include allegations
16 concerning all of the elements of a defamation claim because they do not allege the
17 statements were made in an unprivileged publication to a third party or that the statements
18 resulted in damages. Plaintiffs do not respond to these arguments.

19 "An action for defamation requires the plaintiff to prove four elements: (1) a false
20 and defamatory statement . . . ; (2) an unprivileged publication to a third person;
21 (3) fault, amounting to at least negligence; and (4) actual or presumed damages." Clark
22 Cnty. Sch. Dist. v. Virtual Educ. Software, Inc., 213 P.3d 496, 503 (Nev. 2009) (quotation
23 omitted). Even liberally construing Plaintiffs' Amended Complaint, it is not sufficient to
24 state a claim for defamation. Plaintiffs allege Defendants defamed Cunningham-Dirks
25 "with allegations of criminal intentions," "with allegations of inappropriate intentions and
26 behavior," and "with allegations of inability to appropriately care for [Dirks]." (Am.

1 Compl., ¶¶ 21-23.) Plaintiffs allege Defendant defamed Dirks “with allegations of criminal
2 behavior claiming he was dangerous, creating an unlawful detention.” (Id. at ¶ 24.)

3 Although Plaintiffs list generalities about the defamatory statements that were made, they
4 do not identify who made the statements, what the actual statements were, and to whom
5 they were made. The Court therefore will dismiss Plaintiffs’ libel and slander claims with
6 leave to amend to allege clarifying facts and to ascribe particular conduct to particular
7 Defendants.

8 4. Fraud

9 Summerlin argues Plaintiffs’ fraud claims should be dismissed because Plaintiffs
10 do not plead fraud with the requisite specificity under Federal Rule of Civil Procedure 9.
11 Plaintiffs do not respond to Summerlin’s argument.

12 To state a claim for fraud, a plaintiff must allege (1) the defendant made a false
13 representation, (2) the defendant knew or believed the representation to be false, (3) the
14 defendant intended to induce plaintiff to rely on the misrepresentation, and (4) the plaintiff
15 suffered damages as a result of his or her reliance on the misrepresentation. Barnettler, 956
16 P.2d at 1386. Under Rule 9(b), “a party must state with particularity the circumstances
17 constituting fraud.” Pleading fraud with particularity requires allegations regarding the
18 “time, place, and specific content of the false representations as well as the identities of the
19 parties to the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir.
20 2007) (quotation omitted). Further, “the plaintiff must set forth what is false or misleading
21 about a statement, and why it is false.” Ebeid ex rel. U.S. v. Lungwitz, 616 F.3d 993, 998
22 (9th Cir. 2010) (quotation omitted).

23 Here, Plaintiffs allege Defendants “[f]alsified documents and omitted facts to
24 facilitate hospital/ambulance company policy and staff convenience,” “[m]ade false claims
25 as to both plaintiff’s [sic] medication compliance,” “[k]nowingly made false and misleading
26 statements to both plaintiffs, abusing HIPAA and Nev. Rev. Stat.,” and “[w]ithheld vital

1 information to both plaintiffs, abusing HIPAA and Nev. Rev. Stat.” (Am. Compl., ¶¶ 17,
2 20, 26, 27.) But the Amended Complaint lacks particular pleading with respect to the time,
3 the place, the identity of the parties involved, and the nature of the fraud. Plaintiffs do not
4 identify which Defendant allegedly committed the fraudulent acts. The Court therefore will
5 dismiss Plaintiffs’ fraud claim with leave to amend to add factual support, to set forth what
6 is false or misleading about the statements, and to ascribe conduct to particular Defendants.

7 5. Negligence

8 The parties do not raise arguments regarding negligence. Construed liberally,
9 however, Plaintiffs’ Amended Complaint may allege a negligence claim because Plaintiffs
10 state Defendants “[n]egligently discounted statements of and failed to inform [Cunningham-
11 Dirks] of [Dirks’s] condition and treatment options causing a prolonged condition in
12 violation of ethics and the Nev. Rev. Stat.” (Am. Compl., ¶ 25.) Elsewhere, Plaintiffs
13 allege “Defendants did violate, through negligence . . . the rights of both plaintiff’s [sic] in
14 multiple statutes of the N.R.S. multiple times . . .” (Id. at 2.)

15 To prevail on a negligence claim, a plaintiff must show: “(1) the defendant owed
16 a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the
17 legal cause of the plaintiff’s injury; and (4) the plaintiff suffered damages.” Doud v. Las
18 Vegas Hilton Corp., 864 P.2d 796, 798 (Nev. 1993), superseded on other grounds by Nev.
19 Rev. Stat. § 651.015. To the extent Plaintiffs intend to state a negligence claim, the claim
20 fails because the Amended Complaint does not contain either direct or inferential factual
21 allegations concerning all of the material elements necessary to support a negligence claim.
22 To the extent Plaintiffs are attempting to disguise medical malpractice claims as negligence
23 claims, such claims must fail because Plaintiffs have conceded their medical malpractice
24 claims are time barred. (Pls.’ Opp’n at 6.) The Court therefore will dismiss Plaintiffs’
25 negligence claim with leave to amend to add factual support and to ascribe conduct to
26 particular Defendants. However, Plaintiffs shall not re-assert medical malpractice claims

1 that are time barred.

2 6. Violations of Nevada Revised Statutes

3 The parties do not raise arguments regarding the list of Nevada statutes that
4 Plaintiffs allege Defendants violated. Plaintiffs allege Defendants violated over eighty
5 Nevada statutes related to mental health and medical facilities including Nevada Revised
6 Statutes §§ 449.710, 449.720, 449.730, 433.741 through 433.5503, and 433A.155 through
7 433A.580, but there are no factual allegations supporting a plausible entitlement to relief
8 under each of these statutes. Even pro se complaints must contain either direct or
9 inferential allegations concerning all of the material elements necessary to sustain recovery
10 under a particular claim. Spencer v. DHI Mortg. Co., 642 F. Supp. 2d 1153, 1159-60 (E.D.
11 Cal. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007)). The Court
12 therefore will dismiss Plaintiffs' claims for violation of §§ 449.710, 449.720, 449.730,
13 433.741 through 433.5503, and 433A.155 through 433A.580 with leave to amend. Should
14 Plaintiffs decide to amend this claim, the Court advises Plaintiffs that vague and conclusory
15 allegations that Defendants collectively violated a long list of statutes are insufficient to
16 state a claim. Plaintiffs must allege facts showing how each named Defendant violated each
17 of the statutes.

18 **E. Expert Affidavit Requirement**

19 Summerlin argues that all of Plaintiffs' claims – federal and state – center on
20 allegedly improper medical care provided to Dirks during his involuntary commitment and
21 should be dismissed for failure to attach a medical expert's affidavit pursuant to Nevada
22 Revised Statutes § 41A.071. Summerlin further argues Plaintiffs are attempting to
23 circumvent Nevada's medical malpractice rules by cloaking their medical malpractice
24 claims as other claims, such as negligence claims. Defendants cite Szydel v. Markman, 117
25 P.3d 200 (Nev. 2005), for the proposition that § 41A.071 requires expert affidavits for
26 claims filed in conjunction with medical malpractice claims. Plaintiffs respond that they

1 “did not allege medical malpractice as much was involved, however, the time limit for
2 filing had lapsed, the reason a certificate of a physician was not in this pleading.” (Pls.’
3 Opp’n at 6.) Apparently, Plaintiffs believe that they may have had medical malpractice
4 claims but that these claims are time-barred, which is why Plaintiffs did not attach an
5 expert’s supporting affidavit.

6 Section 41A.071 requires Nevada state courts to dismiss, without prejudice,
7 medical malpractice claims “if the action is filed without an affidavit, supporting the
8 allegations contained in the action, submitted by a medical expert who practices or has
9 practiced in an area that is substantially similar to the type of practice engaged in at the time
10 of the alleged malpractice.” The expert affidavit requirement does not apply when a
11 medical malpractice action is based only on the res ipsa loquitur doctrine, such as cases
12 where a needle or a sponge is left in a patient during an operation, because it would be
13 unreasonable to force plaintiffs to incur costs to obtain an affidavit when expert testimony
14 would not be necessary to succeed at trial. Szydel, 117 P.3d at 203-04. Contrary to
15 Summerlin’s assertion, Szydel does not stand for the proposition that every claim filed in
16 conjunction with a medical malpractice claim must be accompanied with an expert
17 affidavit. Instead, it provides that in cases where res ipsa loquitur claims are filed in
18 conjunction with other medical malpractice claims, expert affidavits are required with
19 respect to the other medical malpractice claims. Id. at 205. Defendants do not provide any
20 other authority explaining why § 41A.071 would apply to non-medical malpractice claims
21 or federal claims, such as Plaintiffs’ constitutional claims.

22 Here, Plaintiffs concede they do not have viable medical malpractice claims,
23 thereby rendering § 41A.071 inapplicable in this case. Further, taking Plaintiffs’ allegations
24 and all reasonable inferences therefrom as true, Plaintiffs are alleging claims related to
25 Dirks’s involuntary confinement itself, not claims related to the medical care Dirks received
26 while detained. The Court therefore will deny Summerlin’s Motion to Dismiss with respect

1 to the expert affidavit requirement.

2 **III. STATE OF NEVADA’S MOTION TO DISMISS (Doc. #14)**

3 **A. Eleventh Amendment**

4 Defendant State of Nevada moves to dismiss, arguing the Eleventh Amendment
5 bars any claims for damages against it in federal court. Plaintiffs respond that the Eleventh
6 Amendment does not bar suit brought against a state by the state’s own citizens. Plaintiffs
7 also argue Nevada waived immunity under Nevada Revised Statutes § 41.031. Finally,
8 Plaintiffs cite to Ex Parte Young regarding injunctive relief.

9 “The Eleventh Amendment bars suits for money damages in federal court against
10 a state, its agencies, and state officials acting in their official capacities.” Aholelei v. Dep’t
11 of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007). The Eleventh Amendment “bars a
12 citizen from bringing suit against the citizen’s own State in federal court, even though the
13 express terms of the Amendment refer only to suits by citizens of another State.” Welch v.
14 Tex. Dep’t of Highways & Pub. Transp., 483 U.S. 468, 472 (1987). Pursuant to Nevada
15 Revised Statutes § 41.031(3), the State of Nevada “does not waive its immunity from suit
16 conferred by Amendment XI of the Constitution of the United States.”

17 Defendant State of Nevada is entitled to Eleventh Amendment immunity for any
18 damages claims asserted against it in this action. Plaintiffs’ argument that the Eleventh
19 Amendment does not apply to suits brought against Nevada by its own citizens is contrary
20 to controlling law. Plaintiffs’ argument that Nevada waived its Eleventh Amendment
21 immunity is contrary to the plain language of § 41.031(3).

22 In addition to damages, Plaintiffs request injunctive relief in the Amended
23 Complaint. The Eleventh Amendment does not bar suits brought in certain circumstances
24 for injunctive relief against state officers who are acting in violation of federal law. Ex
25 Parte Young, 209 U.S. 123 (1908). Consequently, the Eleventh Amendment defense
26 applies only to Plaintiffs’ damages claims, not claims for injunctive relief.

1 **B. Failure to State a Claim**

2 State of Nevada argues that even if Plaintiffs could pursue injunctive relief under
3 Ex Parte Young, Plaintiffs make no factual allegations regarding what federal law was
4 violated by which state official. State of Nevada argues that the sole factual allegation
5 regarding the State does not put it on notice of any acts or omissions for which it is liable.
6 Plaintiffs respond that the State has allowed violations of law as a general matter, and also
7 that Dirks was committed at Rawson-Neal twice during the relevant time period.²

8 The Amended Complaint mentions Rawson-Neal but does not have any factual
9 allegations regarding what happened in relation to Dirks’s stays there or the dates Dirks was
10 a patient at Rawson-Neal. The Amended Complaint’s only allegation regarding the State of
11 Nevada separate and apart from Rawson-Neal is that the “State of Nevada has intentionally
12 and repeatedly failed to take seriously their charge to advocate for those citizens most in
13 need of protection.” (Am. Compl., ¶ 31.) In addition to requesting damages, which are
14 barred by the Eleventh Amendment, Plaintiffs request the Court “[c]ommand the State of
15 Nevada to forgo political semantics and fund healthcare properly to take seriously their
16 charge to advocate for all citizens who are most in need of protection.” (Id. at 3.) Plaintiffs
17 also request the Court appoint an ombudsman to advocate a plan and for Defendants to
18 “assist” Plaintiffs in getting amendments to Nevada statutes. (Id. at 3-4.)

19 These allegations fail to state a claim. Injunctive relief is a remedy, and to be
20 entitled to a remedy Plaintiffs must state a claim against the State of Nevada. State Farm

21
22 ² Nevada Revised Statutes § 41.031(2) requires that actions against the State of Nevada “be
23 brought in the name of the State of Nevada on relation of the particular department, commission, board
24 or other agency of the State whose actions are the basis for the suit.” Section 41.031(2) further
25 requires that the summons and complaint be served on (1) “[t]he Attorney General, or a person
26 designated by the Attorney General, at the Office of the Attorney General in Carson City”; and (2)
“[t]he person serving in the office of administrative head of the named agency.” Id.

 Here, Plaintiffs have failed to bring the action against the State on relation of Rawson-Neal or
another state agency as required by the statute. Nor have Plaintiffs served the administrative head of
any such agency.

1 Mut. Auto. Ins. Co. v. Jafbros Inc., 860 P.2d 176, 178 (Nev. 1993) (referring to an
2 injunction as a remedy); Cole v. CIT Grp./Consumer Fin., Inc., 2010 WL 5134999, at *1
3 n.1 (D. Nev. Dec. 9, 2010) (stating that injunctive relief is a remedy, not a cause of action).
4 Injunctive relief is available when a plaintiff is entitled to such a remedy on an independent
5 cause of action. Id. The Amended Complaint contains no factual allegations that put the
6 State of Nevada on notice of any acts or omissions for which it is liable. Moreover,
7 injunctive relief under Ex Parte Young must be directed at a particular federal official who
8 allegedly is acting in violation of federal law. The Amended Complaint contains no factual
9 allegations from which the State of Nevada could determine which state official allegedly is
10 acting in violation of which federal law. The Court therefore will dismiss Plaintiffs' claims
11 against the State of Nevada with leave to amend to set forth factual allegations regarding
12 which state official or agency, such as Rawson-Neal, violated which federal law, as well as
13 to set forth factual allegations regarding how the federal law was violated. Should Plaintiffs
14 choose to amend their claims against State of Nevada, Plaintiffs must name and serve the
15 state agency as set forth in § 41.031(2).

16 **IV. PLAINTIFFS' MOTION FOR LEAVE TO AMEND (Doc. #27)**

17 Plaintiffs move to amend their Amended Complaint, arguing the confusion their
18 Amended Complaint has generated illustrates their argument that Nevada's mental health
19 system is in a state of disarray. Summerlin responds that Plaintiffs' proposed Second
20 Amended Complaint is futile because it could not withstand a motion to dismiss.
21 Summerlin also contends Plaintiffs' proposed amendments only confuse matters further by
22 adding new defendants without providing factual background explaining their involvement.
23 The State of Nevada joins in Summerlin's Opposition. Plaintiffs respond that they include
24 additional defendants because Valley Health Systems is the parent company of Spring
25 Valley Hospital, Centennial Hills Hospital, Valley Hospital, and Summerlin, and that
26 incidents occurred at these hospitals from April 12, 2010, to April 17, 2012.

1 Generally, a plaintiff may amend his complaint once “as a matter of course”
2 within twenty-one days of serving it, or within twenty-one days after service of a responsive
3 pleading or motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Otherwise, “a
4 party may amend its pleading only with the opposing party’s written consent or the court’s
5 leave.” Fed. R. Civ. P. 15(a)(2). “The court should freely give leave when justice so
6 requires.” Id.; Foman v. Davis, 371 U.S. 178, 182 (1962). “The court considers five factors
7 in assessing the propriety of leave to amend—bad faith, undue delay, prejudice to the
8 opposing party, futility of amendment, and whether the plaintiff has previously amended the
9 complaint.” United States v. Corinthian Colls., 655 F.3d 984, 995 (9th Cir. 2011). A
10 proposed amendment is futile if it could not withstand a Rule 12(b)(6) motion for failure to
11 state a claim. Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). It is within
12 the district court’s discretion to determine whether to grant leave to amend, and “[a] district
13 court does not err in denying leave to amend where the amendment would be futile.”
14 Gardner v. Martino, 563 F.3d 981, 990 (9th Cir. 2009).

15 Here, there is no indicia of bad faith or undue delay. Plaintiffs previously have
16 amended their Complaint, however, it was before Defendants were served. Thus, the
17 relevant questions are whether amendment would be futile and whether amendment will
18 prejudice Defendants. Although Plaintiffs’ proposed Second Amended Complaint includes
19 additional factual allegations, such as the dates of each Defendant’s involvement, and
20 attempts to ascribe certain allegations to certain Defendants, the proposed amendment
21 largely repeats the same allegations contained in the operative Amended Complaint.
22 Allowing Plaintiffs to proceed with the proposed Second Amended Complaint would be
23 futile and would result in prejudice to Defendants. The Court therefore will deny Plaintiffs’
24 Motion.

25 The Court will, however, grant Plaintiffs leave to file a Second Amended
26 Complaint in accordance with the instructions set forth in this Order. If Plaintiffs choose to

1 file a Second Amended Complaint, Plaintiffs must correct the deficiencies identified in this
2 Order for those claims that can be cured through amendment. Specifically, to state a claim
3 under 42 U.S.C. § 1983 against American Medical, Plaintiffs must allege facts indicating
4 how American Medical is a state actor if Dirks voluntarily rode in the ambulance to the
5 hospital. To state Fifth and Eighth Amendment claims, Plaintiffs must allege facts
6 regarding the criminal proceedings or convictions, if any, which Dirks was subjected to
7 related to this case. To state a Fourth Amendment claim, Plaintiffs must allege facts as to
8 when or where their personal conversations occurred, that the person who eavesdropped
9 was acting as a state actor, and that Plaintiffs had a legitimate expectation of privacy at the
10 time of the conversations.

11 To state a Fourteenth Amendment claim related to violation of Nevada Revised
12 Statutes § 433A.160, Plaintiffs must allege facts clarifying whether they are challenging
13 Chapter 433A as a whole for failing to provide a mechanism to challenge an involuntary
14 commitment within 72 hours or whether they are alleging a failure to follow the existing
15 statutory requirements in their particular circumstances. To state a Fourteenth Amendment
16 claim based on deprivation of food, clothing, shelter, medical care, and mental health
17 treatment or based on deprivation of liberty related to the mechanical restraints, Plaintiffs
18 must allege facts supporting these claims.

19 To state a claim for false imprisonment, Plaintiffs must allege facts indicating
20 Defendants acted with malice or bad faith or that Dirks suffered physical harm due to a
21 Defendant's negligence, if such facts exist. To state a claim for negligent infliction of
22 emotional distress, Plaintiffs must allege facts supporting the elements of either a direct or
23 bystander claim of negligent infliction of emotional distress. To state a claim for
24 defamation, Plaintiffs must allege facts identifying who made the allegedly defamatory
25 statements, what the actual statements were, and to whom they were made. To state a claim
26 for fraud, Plaintiffs must allege facts regarding the time, place, specific content of the

1 representations, the identities of the parties to the representations, and what is false or
2 misleading about the representations. If Plaintiffs intend to state a claim for negligence,
3 Plaintiffs must allege facts supporting the elements of a negligence claim and shall not
4 attempt to bring time-barred medical malpractice claims under the guise of a negligence
5 claim. To state a claim for violation of a particular Nevada statute, Plaintiffs must allege
6 facts showing which Defendant violated which statute and the manner in which the statute
7 was violated. Vague and conclusory allegations that multiple Defendants collectively
8 violated a long list of statutes are insufficient.

9 With respect to their claims against State of Nevada, Plaintiffs must allege facts
10 regarding what federal law was violated by which state official and must properly name and
11 serve such state official pursuant to Nevada Revised Statutes § 41.031(2).

12 For all of the aforementioned claims, Plaintiffs must ascribe particular conduct to
13 particular Defendants rather than referring to Defendants collectively. Further, Plaintiffs
14 shall not re-assert claims the Court has dismissed with prejudice, which include Plaintiffs'
15 claims for violation of 18 U.S.C. §§ 241, 242, and HIPAA.

16 Moreover, Plaintiffs shall avoid including claims or requests for relief that are not
17 cognizable in this Court. Specifically, Plaintiffs shall not request that the Court appoint an
18 ombudsman to advocate for certain groups of citizens, such as the mentally ill population,
19 nor shall Plaintiffs reattach their proposed ombudsman plan. Further, Plaintiffs shall not
20 request that the Court assist them in obtaining amendments to Nevada statutes or that the
21 Court order the State of Nevada to advocate for a certain group of citizens or to amend its
22 statutes in any particular way. Such requests are outside the Court's purview and would be
23 more properly addressed to the Nevada Legislature or other regulatory or administrative
24 agencies.

25 If Plaintiffs choose to file a Second Amended Complaint, Plaintiffs are further
26 advised all Defendants must be identified in the caption of the pleading and that all

1 Defendants must be named in the section of the Second Amended Complaint designated for
2 that purpose. Although the Federal Rules of Civil Procedure adopt a flexible pleading
3 policy, Plaintiffs still must give Defendants fair notice of each of the claims Plaintiffs are
4 alleging against each Defendant. Specifically, Plaintiffs must allege facts showing how
5 each named Defendant is involved and the approximate dates of their involvement.

6 Furthermore, Plaintiffs are advised that if they file a Second Amended
7 Complaint, the original Complaint (Doc. #1) and Amended Complaint (Doc. #4) no longer
8 serve any function in this case. As such, if Plaintiffs file a Second Amended Complaint,
9 each claim and the involvement of each Defendant must be alleged sufficiently. The Court
10 cannot refer to a prior pleading or to other documents to make Plaintiffs' Second Amended
11 Complaint complete. The Second Amended Complaint must be complete in and of itself
12 without reference to prior pleadings or to other documents.

13 Given that this is Plaintiffs' third opportunity to amend, failure to comply with
14 this Order will result in the dismissal, with prejudice, of the claims Plaintiffs are permitted
15 to amend. Consequently, the Court strongly encourages Plaintiffs to obtain counsel to
16 represent them in this case. If Plaintiffs are unable to obtain private counsel, Plaintiffs may
17 wish to contact an organization such as the Legal Aid Center of Southern Nevada, the
18 Nevada Disability Advocacy and Law Center, or the American Civil Liberties Union of
19 Nevada.

20 **V. PLAINTIFFS' MOTION TO CHALLENGE THE CONSTITUTIONALITY**
21 **OF NEVADA REVISED STATUTES (Doc. #42)**

22 Plaintiffs move to challenge the constitutionality of Nevada Revised Statutes
23 Chapter 433, including but not limited to §§ 433A.145, 433A.150, 433A.160, and
24 433A.170. Plaintiffs argue these statutes are unconstitutional because "the grievance
25 process is inadequate, time consuming and so costly that people can not afford either
26 financially or emotionally to redress their grievances so, most often they have no choice but

1 to surrender.” (Mot. to Challenge the Constitutionality of Nev. Rev. Stat. (Doc. #42), at 2.)
2 Plaintiffs further argue the statutes are unconstitutional because they set policies that
3 conflict with state and federal statutes; for instance, Chapter 433 has “turned the premise of
4 ‘innocent until proven guilty’ into ‘guilty until such a time as you prove, to a doctor’s
5 satisfaction, that you are not.’” (Id. (emphasis omitted).) Finally, Plaintiffs argue the
6 statutes are unconstitutional because they effectively turn mental illness into a crime
7 because people can be detained because they might commit a crime. (Id. at 2-3.)

8 Summerlin responds that Plaintiffs’ Motion should be denied because it focuses
9 on Plaintiffs’ perceived shortcomings of Nevada’s mental health system instead of
10 providing legal arguments for declaring the statutes unconstitutional. Summerlin further
11 argues that statutes are presumed constitutional, and that Plaintiffs have failed to meet their
12 burden of negating every conceivable basis that may support the statutes’ constitutionality.
13 American Medical Response joins in Summerlin’s Opposition.

14 The State of Nevada separately responds that Plaintiffs’ Motion does not comply
15 with Federal Rule of Civil Procedure 5.1, which deals with notice and certification of
16 constitutional questions to the appropriate attorney general. The State of Nevada further
17 argues that the statutes in question do not allow mentally ill individuals to be arrested, and
18 that the statutes make no mention of mentally ill individuals committing crimes. Instead,
19 the statutes provide a procedure for mentally ill individuals to be detained in a medical
20 facility for no longer than seventy two hours upon an application for emergency admission
21 by certain qualified individuals, such as physicians. American Medical Response joins in
22 State of Nevada’s Opposition.

23 The statutes Plaintiffs argue are unconstitutional are included in the list of eighty-
24 plus statutes Plaintiffs allege Defendants violated. Beyond Plaintiffs’ listing of these
25 statutes in the Amended Complaint, the statutes are not at issue in this case, with the
26 exception of Nevada Revised Statutes § 433A.160, the Legal 2000 statute. Further,

1 Plaintiffs do not allege in the Amended Complaint that these statutes are unconstitutional.
2 Given the insufficiency of the allegations in Plaintiffs' Amended Complaint with respect to
3 these statutes and the lack of legal arguments in Plaintiffs' Motion, the Court will deny
4 Plaintiffs' Motion.

5 **VI. CONCLUSION**

6 IT IS ORDERED that Defendant Summerlin Hospital Medical Center, LLC's
7 ("Summerlin") Motion to Dismiss Plaintiffs' Amended Complaint (Doc. #8) is hereby
8 DENIED in part and GRANTED part. The Motion is denied with respect to Plaintiffs'
9 Fourteenth Amendment claim based on Plaintiffs' allegation that Dirks was deprived of his
10 liberty even though he was not a danger to himself or others. The Motion is granted in all
11 other respects.

12 IT IS FURTHER ORDERED that Defendant American Medical Response, Inc.'s
13 Joinder to Defendant Summerlin Hospital Medical Center, LLC's Motion to Dismiss (Doc.
14 #12) is hereby GRANTED.

15 IT IS FURTHER ORDERED that Defendant State of Nevada's Motion to
16 Dismiss (Doc. #14) is hereby GRANTED.

17 IT IS FURTHER ORDERED that Defendant American Medical Response, Inc.'s
18 Joinder to Defendant State of Nevada's Motion to Dismiss (Doc. #17) is hereby
19 GRANTED.

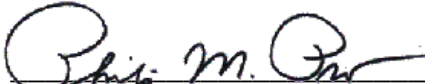
20 IT IS FURTHER ORDERED that Plaintiffs Dewey Dirks and Elaine
21 Cunningham-Dirks's Motion for Leave of Court (Doc. #27) is hereby DENIED. Plaintiffs
22 Dewey Dirks and Elaine Cunningham-Dirks shall have thirty (30) days from the date of this
23 Order to file a Second Amended Complaint if they believe they can correct the noted
24 deficiencies. Failure to comply with this Order will result in dismissal, with prejudice, of
25 the claims Plaintiffs are permitted to amend.

26 IT IS FURTHER ORDERED that Plaintiffs Dewey Dirks and Elaine

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Cunningham-Dirks's Motion to Challenge the Constitutionality of Nevada Revised Statutes
(Doc. #42) is hereby DENIED.

DATED: January 2, 2013


PHILIP M. PRO
United States District Judge